



# Kentucky Waterways Alliance

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*Melville*

✓ John H. Hankinson, Jr.  
Region 4 Regional Administrator  
US EPA  
61 Forsyth Street  
Atlanta, GA 30303

J. Charles Fox  
Office of Water  
US EPA  
401 M St SW  
Washington, DC 20460

August 2, 1999

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Dear Mr. Hankinson and Mr. Fox,

Attached are Kentucky Waterways Alliance comments on Kentucky's revisions to the water quality standards. We urge you to carefully review Kentucky's submission. Unless substantial changes are made from the current regulatory package, we do not feel they meet the anti-degradation requirements and continue to be underinclusive and underprotective of Tier II waters.

In addition, we urge you to **deny the state request to downgrade the classification of many rivers and streams, without public notice or the opportunity for public comments and input in the affected communities.** In fact, we feel very strongly that the Cabinet was serious delinquent in its duties to solicit public comment and input during this entire Triennial Review process.

Thank you for your time and consideration of our comments. We look forward to the federal rulemaking process to promulgate replacement standards that will protect Kentucky's waters. Please feel free to contact me should you have any questions regarding our comments.

Sincerely,

*Judith D. Petersen*  
Judith D. Petersen, Executive Director



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Jack Wilson, Director  
Division of Water  
14 Reilly Road  
Frankfort, Kentucky 40601  
July 26, 1999

CC: Chuck Fox, EPA Assistant Administrator, Office of Water  
John H. Hankinson, Jr. EPA Region 4, Regional Administrator

Re: Proposed Regulations 401 KAR 5:002, 5:026, 5:029, 5:030, 5:031  
Kentucky Water Quality Standards / Triennial Review

Dear Director Wilson:

The Kentucky Waterways Alliance, Inc., being particularly concerned about the protection and restoration of Kentucky's watersheds and waterways, present these comments concerning the proposed revisions to the state water quality standards. We hope that the Cabinet will consider our comments and the comments presented by Tom Fitzgerald at the Kentucky Resources Council, and Hank Graddy and Associates which we also fully support and revise the proposed regulations in order to make them more consistent with the letter and spirit of the federal Clean Water Act.

The Clean Water Act set out a national goal of restoring and protecting all waters in order to assure "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." The Act further states that the objective is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. And in order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter -

- (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;
- (2) it is the national goal that whenever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water shall be achieved by July 1, 1983;
- (3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited.

Since Kentucky's water quality standards are the state's attempt to enforce and implement the Clean Water Act, they remain the principal protection for the integrity of our waters. Any proposal to amend the existing regulations should be fully consistent with the purposes of the Clean Water Act - to restore, protect and maintain the integrity of our state's waters. The proposed regulations are not, in our opinion, consistent with the law and the goal of restoring and protecting our state rivers, streams and lakes, in several key areas.

#### **Anti-Degradation Policy Implementation Methodology, 401 KAR 5:030**

Anti-degradation is the keystone to the protection of all waters that are not already use impaired, the waters typically referred to as Tier II or Tier III waters. These waters are to be protected at their existing water quality. Anti-degradation is also the protection afforded to all waters to maintain, protect and restore water quality such that all existing and designated uses are supported. The state's proposal is still lacking a number of key areas and if not revised, it is our position that the EPA should again disapprove Kentucky's anti-degradation policy and promulgates replacement standards. Indeed the EPA by letter to the Cabinet Secretary as recently as June 1999 has promised to do so if Kentucky's policy does not meet federal standards.

First, to the extent that a waterbody is, for any parameter which might be adversely affected by the discharge, of a quality in excess of the minimum level necessary to sustain the designated uses (warmwater aquatic and primary/secondary contact recreation), a Tier II antidegradation analysis must be conducted in a manner consistent with 40 CFR Part 131.

Second, the criteria for according Tier II antidegradation protection to streams must be sufficiently inclusive to afford this level of protection to all waters with better than minimum water quality. This was a major factor in the EPA disapproval of Kentucky's policy in 1997 and KWA believes that the proposal put forth by the Division is still sadly lacking in protecting this vital category of Kentucky's waters.

The EPA in disapproving Kentucky's policy has specifically requested that Kentucky "modify this subsection to include additional selection criteria under subsection 1(3)" which criteria must "address the inclusion of Tier II waters where water quality conditions exceed the levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water." The letter further noted that either the "designational approach" or the "pollutant-by-pollutant" approach could be used.

The Cabinet's proposal for ranking waters as Tier II seems to completely abandon the mandate to protect and maintain water quality for all streams where that quality exceeds the minimum standards except for those few streams which it considers "exceptional" or which are state wild rivers or reference reach streams. This proposal, rather than expanding the category of streams entitled to the protection of current water quality, further reduces the percentage of streams entitled to such protection. In doing so, we believe this proposal will trigger the EPA's obligation to promulgate federal regulations for Kentucky. **KWA believes that in the absence of good quality data on a river, stream or lake the water quality should be assumed to be better than necessary to support basic uses and the waterway is deserving of Tier II protection.**

Specifically, the Cabinet's proposed rule is significantly underinclusive of Tier II waters, given that EPA has indicated that any stream which has better-than-minimum quality should be protected for that increment of quality and that where any stream is of higher quality for any measured constituent (such as iron, copper, oxygen, etc.) than the level needed to maintain the designated use(s), that stream should be considered as "high quality" for that parameter. This pollutant-by pollutant approach is consistent with EPA policy, as reflected both in the Great Lakes Strategy, 58 Fed. Reg. 20893 (April 16, 1993), and also the revised Water Quality Standards Handbook. KWA urges the Cabinet to afford Kentucky waters the protections mandated under the Clean Water Act and adopt this approach.

In addition to being underinclusive of what waters will be protected for their current water quality, the proposed implementation criteria for these "exceptional waters" also violates the antidegradation requirement by allowing, through the Section 1(5) procedure for implementation, the routine lowering of water quality within stream reaches for domestic discharges and chlorides without first requiring that the justification for lowering stream quality be met, and further, by exempting stormwater discharges from inclusion in the antidegradation analysis. Furthermore, KWA asserts that permit renewals for streams that are in the Tier II category cannot be exempted from compliance with the antidegradation requirement unless those permits were previously scrutinized for maintenance of water quality.

As previously stated the proposal to limit Tier II protected waters to those of "exceptional" biological quality are flawed for another reason. That is, Kentucky lacks the basic biological information needed to support a determination that the water is of "exceptional" quality for most of the state's streams. The proposed regulation assumes that the stream is not high quality until proven otherwise, yet does not require the proposed discharger to prove or disprove the fact. Instead the burden is wrongfully shifted to the public to demonstrate that the stream is high quality based on meeting the biological criteria. The state approach treats all streams as warmwater aquatic habitat unless it can be demonstrated by the public, based on five years of water quality data, that the water is of higher quality, and there is no obligation for the proposed polluter to test the water or provide such data. The result will be the lowering of water quality for those many streams in the state which have water quality better than the bare minimum, but for which we lack data. The effect is to protect even less than the 3% of Kentucky's 89,000 miles of streams than did the former proposal. Again, **KWA proposes that in the absence of good quality data on a river, stream or lake the water quality should be assumed to be better than necessary to support basic uses and the waterway is deserving of Tier II protection.**

A final area in which the regulation is flawed is in the handling of "alternatives." While the Waterways Alliance supports the concept of requiring an "alternatives analysis", such an undertaking must be meaningful, able to affect the permit limits, treatment options selected and available for public review and comment prior to a final permit decision by the Cabinet. The proposed regulation sets no criteria by which the Cabinet will approve or disapprove the request for a permit based on the availability or lack of availability of alternatives. We believe there should first be an evaluation of whether the lowering of water quality was "necessary," which requires a review of alternatives and a conclusion that such alternatives are unavailable. Next an assessment of whether the highest statutory and regulatory requirements were being achieved for all new and existing point sources and whether all BMPs were being employed within the stream.

reach before the agency concluded that it was necessary to lower water quality to accommodate the new discharge. Instead, the proposal for alternatives review establishes no requirement for justifying the new discharge, and establishes no decisional criteria for whether to approve or reject a request for a permit where alternatives exist. Finally, there is no opportunity for the public to review and comment on the "alternative analysis" or any DOW proposal to lower the water quality in a waterway. Public notice should be given in the affected communities and in statewide notice, the information should be available in those communities and a Public Hearing should be required upon request.

In addition, there are a few details; questions and clarifications we feel are needed.

- Section 1 (3) (b) states "Outstanding state resource waters other than those that support federally threatened or endangered aquatic species;" appears to contradict the definition of state outstanding resource water found in 5:031, p.18.
- Section 1 (4) (b) should make clear that any such changes in water quality are **unavoidable** (full justification would be needed) and have been found (by way of an analysis) to have no lasting impact on the Tier III designation of the water. It should further require both monitoring and bio monitoring as appropriate.
- Section 1 (5) (b) 5. should read "restricted to **no more than one-half**" (bold text is added).

#### **Designation of Uses of Surface Waters, 401 KAR 5:026**

KWA strongly concurs with the Kentucky Resources Council objection to the use of the term "surface waters" in lieu of "waters" or "waters of the Commonwealth." The Cabinet is obligated by state law to develop a program for protection not merely of "surface waters" but of "waters of the Commonwealth," a term which is broadly defined at law to include not merely "surface waters," but to include a wide array of surface and underground waterbodies:

**KWA strongly objects to the broad reclassification of waters in this regulation.** The mechanism for notice of a proposed reclassification should be clarified to assure that the notice is adequate and specific. Redesignation proposals should be broadly publicized and affirmative steps taken to assure that parties that have expressed historical interest, or which are in the locality to be affected, are notified in a manner intended to inform. Such parties should have the opportunity to request a Public Hearing and present personal testimony on the history and uses of the water.

The reclassification of many streams from coldwater to warmwater aquatic habitat is opposed for two reasons. 1.) The removal of coldwater status constitutes a downgrading of the stream which is lawful only where it is demonstrated that irretrievable conditions exist which prevent and will continue to prevent attainment of that use. A downgrading of the protected status is unlawful absent a documented demonstration by the cabinet that the coldwater habitat criteria no longer exist in those watersheds. 2.) 40 CFR 131.10 demands that the Cabinet justify any removal of a protected use as infeasible based on one or more rigorous standards demonstrating not merely that the stream does not currently support the use, but that it cannot support the use because of natural or person-induced conditions preventing attainment.

Specifically, with the KWA office located in the Green River Basin, KWA's Director and her associates, have more than a decade of personal knowledge of several streams proposed for reclassification. Both Lynn Camp Creek and Roundstone Creek in Hart County support trout populations and are considered valuable historic coldwater resources in the county. Attached to our comments is a personal testimony from Mr. Woody Plaut, a property owner with approximately 2.5 miles of frontage along Lynn Camp Creek. Testimony from Mr. Dan Givens, a property owner along the Roundstone Creek was to be faxed to the DOW on July 27<sup>th</sup>. In addition, KWA objects specifically to the removal of Outstanding Resource Water status of 31 miles of the Green River in Hart County (Mile 291.0 – 260.0). This section of the Green River is recognized by many groups including the Kentucky Nature Preserves Commission and The Nature Conservancy as habitat for a number of federally as well state threatened and endangered species. Finally, the Hart County Judge/Executive, Mr. Terry Shelton was also dismayed at these reclassifications and was scheduled to fax a request for a Public Hearing and Cabinet's justification to the DOW on July 27<sup>th</sup>.

**The Cabinet is strongly encouraged to give public notice and the opportunity for community Public Hearings on all proposed reclassifications as outlined above prior to submitting these redesignations to the EPA.**

#### **General Provisions, 401 KAR 5:029**

The provisions of the antidegradation policy of Section 1 of this regulation would need to be changed to reflect the comments provided for 401 KAR 5:030. Of specific concern is the Cabinet's classification of Tier II waters as "exceptional waters". As outlined in our comments on KAR 5:030, this category of waters should be inclusive of the states waters, both waters of which we have current monitoring data and those which we have yet to test or monitor.

The antidegradation policy of 401 KAR 5:029 Section 1(3) also needs clarification to assure that outstanding national resource waters are not degraded in the same manner as is proposed for "exceptional" waters. Specifically, the reference in 5:029 Section 1(3) to 5:030 should specifically refer to 5:030 Section 1(4).

Section 2, the withdrawal and discharge of contaminated waters regulation needs modification to limit the exemption to those situations in which the withdrawal and subsequent discharge does not alter the physical or chemical characteristics, result in concentration of the pollutants in the wastewater, or reintroduction pollutants into the stream in a manner that will cause additional adverse effects.

KWA opposes the continued use of Mixing Zones, which the state may chose to allow under the Clean Water Act and subsequent guidance. Of particular concern are those cases where a mixing zone is used to "dilute" in stream concentrations of pollutants such as metals, carcinogens or any toxins that bio-accumulate. In these instances the use of a mixing zone serves no purpose other than to allow the receiving water to "dilute" the concentration of such substances rather than requiring the permittee to treat wastewater to remove the pollutants. This is in direct contradiction to two of the specific goals set out in the Clean Water Act: (a) the discharge of pollutants into the navigable waters be eliminated by 1985; and (b) the discharge of toxic pollutants in toxic amounts be prohibited.

KWA is particularly concerned about the continued use of a Zone of Initial Dilution in which the Cabinet sets forth guidance allowing permittees to continually discharge acutely toxic levels of pollutants into our waters in complete disregard of the Clean Water Act. We assert that the use of a submerged multi-port outfall serves no purpose other than allow to the discharge to be "out of sight and out of mind", to make sampling the discharge more difficult and the permits harder to calculate and more difficult to comment on. We challenge the Cabinet to provide justification as to the "treatment" such an outfall provides that allows a permittee to discharge acutely toxic levels of pollutants into our waters.

#### Surface Water Standards, KAR 401 5:031

Sections 9 and 10, Exceptions To Criteria For Specific Waterbodies or Specific Dischargers appears to set forth a way to completely ignore water quality protections established in the antidegradation policy, which requires that the necessity for any degradation of Tier II waters be documented and that all appropriate point and non-point controls be employed first. As previously stated, KWA urges the Cabinet to adopt and enforce an antidegradation policy that is fully compliant with the Clean Water Act. Unless the Cabinet can justify how such exceptions do not violate enforcement of a federally approvable policy, KWA would oppose the granting of such exceptions. We believe the federal guidance sets forth: 1) the basis that the water quality standards are intended to be applied on a waterbody-basis, rather than a discharger-specific basis and 2) a formal petition mechanism to downgrade a stream segment. Of course, no downgrading which removed warmwater aquatic habitat as a designated use, could be approved in a manner consistent with the Clean Water Act goals and purposes.

In closing KWA again urges the Cabinet to beginning planing early to conduct a through outreach effort to solicit public input prior to or during the development of revised water quality standards. The Waterways Alliance would be happy to assist in the public outreach effort. We strongly encourage such a public outreach effort prior to the adoption of the redesignations of water resources. Thank you for your consideration of our comments. Please contact Judith Petersen, Executive Director with any questions regarding these comments.

Sincerely,



Judith D. Petersen  
Executive Director

Submission for testimony at a public hearing on July 27, 1999, at 7:00 p.m. (Eastern Daylight time) at the Western Hills High School Auditorium

July 24, 1999

To the Division of Water,

It has just come to my attention that the Division of Water proposes a change in the designation of two Hart County waterways, Lynn Camp Creek and Roundstone Creek, from cold water aquatic habitats to warm water aquatic habitats. As a property owner with 2.5 miles of frontage on Lynn Camp Creek, I am shocked that this would ever be considered let alone proposed. Implied in such a change is a further allowance by the state of the degradation of these beautiful natural habitats.

As an avid fisherman, I bought this piece of land over twenty years ago because of its unique designation as a stocked trout stream. Not only does the state stock this stream with rainbow trout, but, due to the exceptional water quality of the Lynn Camp, it is one of only three streams statewide that is stocked also with brown trout. I have also caught many other species of fish in the creek, among which are large mouth bass, small mouth bass, rock bass, and channel catfish, even though trout are certainly the most plentiful fish present. The ambient cold temperature is perfect for trout and my children know how even during the hottest days of summer the creek is almost excruciatingly cold when we go swimming. When I first bought this land years ago, I researched the possibility of putting a trout farm in our bottom lands using creek water in the raceways. At that time, through research comparing the environment to similar trout producing regions in North Carolina and Idaho, I was pleased to discover that along with the very cold temperature of the water, the dissolved oxygen required to raise trout, was much higher than the other comparable environments. This sold me on the property at the time of my original purchase; and, I continue to assign the largest part of the value of my land to my frontage on a stocked trout stream.

About ten years ago, a waste disposal company, bidding for out-of-county and out-of-state waste, attempted to site a huge new dump on the Lynn Camp watershed. With a population in the community of 15,000 at that time, over 2,000 people attended rallies and hearings run by among other agencies, the Division of Water, to testify and object to the violation of our local environment. Needless to say, the state of Kentucky was not prepared for this kind of public outcry and the dump was not approved. I have talked to many neighbors up and down the Lynn Camp watershed and I can assure you that not one of them was in favor of the proposed change in designation or the new potential threats that the change could bring, allowing new discharges into the stream. I can report that my neighbors were most shocked at the attempt by the division to apparently 'sneak one by on them'. The ramifications of such actions, when government agencies, unbeknownst to the common citizens they serve, enact policies that can radically change people's quality of life without their approval, are chilling and decidedly undemocratic. Therefore, with this in mind, my neighbors and I demand a public hearing in Hart County to air our grievances in a forum whereby our voices are not only heard, but considered as well, after all, we live here.

I can also inform you that the Nature Conservancy, one of the most prominent guardians of the natural environment in the world, has adopted the Green River watershed, of which



the Lynn Camp Creek is a significant part, as a world bioreserve. This designation is not easily acquired and emphasizes the important role that the bioreserve has in preserving a unique ecological niche which includes the largest number of species of freshwater mussels in the world. Since the majority of the Green River is a designated Outstanding Water Resource, with the exception of a 31 mile stretch through Hart County, it is time to consider the inclusion of this section too. The presently undesignated area contains numerous threatened and endangered species, especially the aforementioned fresh water mussel community.

Another regular use of the Lynn Camp Creek is canoeing at high water stages; and, for years, we have used the regular study of the creek's flora and fauna as an outdoor classroom for our children, their teachers, and friends. Beaver, mink, muskrat, fox, deer, raccoon, skunk, turkey, weasel and opossum, are among the many animal species we have encountered. Our biweekly spring wildflower walks on the creek floodplains have yielded many species including some that are both rare and endangered.

Having recently received a mailing from the Kentucky Resources Council, I am in complete support of the comments listed. Since the EPA has found the state's change in stream designation to be in violation of the Clean Water Act, why would the state ever risk fines and extended legal liability to violate the EPA stated policies? The Clean Water Act is one of the few acts in recent times which for years has had unswerving bipartisan support in Washington. How exactly does the division's policy fit with such bipartisan support? This in itself is irresponsible on the Division of Water's part; and, serious consequences may result if the division persists in such wrong headed policy making. It is also not obvious that the division has worked in coordination with other branches of affected state government. For example, the Division of Fish and Wildlife has spent years developing selected sites statewide to stock with trout to both increase the outdoor recreational opportunities for all Kentuckians and to bring in out of state tourist dollars. These two provide a plethora of user fees generated to manage and develop more sites adding to our state's reputation as a wonderful natural paradise in which to explore and spend a vacation. Both Lynn Camp Creek and Roundstone Creek have contributed to this management plan for over a score of years. Is it the Division of Water's plan to place this all in jeopardy by opening up loopholes which can lead to a degradation of our resources? If we want to enhance our own quality of life, raise property values and thereby our tax base, and attract out of state dollars, we must direct our policy towards adding more high quality waterways to our system, not removing them. We must follow the trend nationwide to take these actions using such prominent examples as the restoration of the Hudson River as our models. Kentucky has the most free running water of any state in the coterminous United States. Let us take pride in that by placing value in our resources, and, thereby, increasing their value to all.

Respectfully submitted,

*Woody Plaut*

Woody Plaut, landowner and concerned citizen

cc: Hart County News and Herald